UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, *et al.*,

Plaintiffs

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (CKK)

ORDER

Pending before the Court is a request by non-Party SBC Communications, Inc. ("SBC") to "prevent disclosure, and order the immediate return" of Defendant's Exhibit 1351 on the grounds that the document in question purportedly contains "privileged attorney-client communications" and "was inadvertently produced to Microsoft during discovery."[1] SBC Mot. at 1. SBC Associate Director–Product Design Larry Pearson has been presented as a witness by the Litigating States in conjunction with a hearing being held on the appropriate remedy for antitrust violations found by the District Court in this case and affirmed by the Court of Appeals. Having reviewed the SBC's and Microsoft's respective memoranda, the document at issue, and the relevant case law, the Court finds that, by providing the document to Microsoft, SBC waived its right to assert the protections of the attorney-client privilege in relation to Defendant's Exhibit

[1]In its original motion SBC also raised issues surrounding the use of Defendant's Exhibit 1352 based on SBC's designation of Defendant's Exhibit 1352 as a "Highly Confidential" document. SBC later brought a similar motion with regard to Defendant's Exhibit 1353. The parties have since informed the Court that issues surrounding the use of Defendant's Exhibits 1352 and 1353 have been resolved amicably by the parties and will not require Court intervention.

1351. The Court, therefore, concludes that the document need not be returned to SBC and may be used in conjunction with these proceedings. In so concluding, the Court does not reach the issue of whether Defendant's Exhibit 1351 was, at some point, a privileged document.

As noted at the outset, SBC asserts that Defendant's Exhibit 1351 "contains privileged attorney-client communications" that "should not be used in any manner in these proceedings." SBC Mem., Ex. D ¶ 10. In this regard, SBC insists that, in concert with its production of Defendant's Exhibit 1351 along with other documents, SBC "specifically reserved its right to claim that any privileged documents that were inadvertently produced be returned immediately and not be used for any purpose."[2] SBC Mot. at 2. SBC notes that it reserved this "right" in conjunction with its "good-faith attempt to thoroughly comply with [a] subpoena." *Id.*

The first issue before the Court is whether D.C. Circuit law or Fifth Circuit law should apply to the Court's analysis of Defendant's Exhibit 1351. SBC insists that this Court should apply Fifth Circuit law because the document was produced pursuant to a subpoena issued in the Western District of Texas in conjunction with the litigation presently pending before this Court. SBC notes in this regard that the document itself was located in Texas, where SBC maintains its principal place of business.

Although SBC frames the issue as a "choice of law" issue, a "choice of law" analysis is not appropriate in this instance. In *In re Ramaekers*, 33 F. Supp. 2d 312, 315 (S.D.N.Y. 1999), a case cited by SBC, the court explains:

> Choice of law analysis is generally inappropriate in federal question cases, such as the instant action, where the choice involves the law of two or more circuits. Federal courts comprise a single system applying a single body of law, and no litigant has a

[2]It appears that SBC's reservation of "right" was unilateral and not consented to by Microsoft.

> right to have the interpretation of one federal court rather than that of another determine his case. . . . District courts have a responsibility to engage independently in reasoned analysis. Binding precedent for the district courts within a circuit is established by the Supreme Court and by the court of appeals for the circuit in which the district court sits. There is no room in the federal system of review for rote acceptance of the decision of a court outside the chain of direct review. If a federal court simply accepts the interpretation of another circuit without independently addressing the merits, it is not doing its job.

Ramaekers, 33 F. Supp. 2d at 315 (internal citations and quotation marks omitted). This view accords with law in this Circuit. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1175 (D.C. Cir. 1987).

Despite the absence of a "choice of law issue," relying still upon *Ramaekers*, SBC insists that Fifth Circuit law should apply to this Court's analysis of attorney-client privilege. In particular, *Ramaekers* states that "*in cases like this one*, courts have uniformly applied the law of the circuit in which the subpoena issued." 33 F. Supp. 2d at 316 (emphasis added). As support for this proposition, the *Ramaekers* court goes on to cite to a number of other cases where the law of the circuit issuing the subpoena is applied to issues concerning attorney-client privilege. Regrettably, SBC's reliance upon this portion of *Ramaekers* misses the point. This is not a "case like [the] one" before the *Ramaekers* court. In that case, and in each of the cases cited by that court, the courts were called upon to address issues of privilege and/or compliance with a subpoena where a subpoena was issued from the jurisdiction within which the court was sitting. *Id.* at 313-315. Those courts then applied the law of the jurisdiction where the subpoena was issued, which was, in every case, that court's own law and precedent, and not that of another jurisdiction. Thus, home-circuit case law applied notwithstanding the fact that the underlying action was pending in another jurisdiction. *Id.* at 316 (and cases cited therein). Said otherwise, in no case cited in *Ramaekers* or by SBC did a court addressing issues of federal law apply the

law of a circuit other than the law of the circuit in which that court sits. *Id.* (and cases cited therein).

In contravention of the logic and holdings of *Ramaekers* and the cases cited therein, SBC asks this Court to apply law from another jurisdiction, specifically Fifth Circuit law, to the analysis of the applicability of attorney-client privilege, and the potential waiver thereof, with respect to Defendant's Exhibit 1351. In contrast to *Ramaekers*, the relevant subpoena in this case did not originate in this jurisdiction and this Court is not being asked to compel, or protect, compliance with that subpoena. Instead, SBC has come to this Court asking that the Court prevent Microsoft from introducing an already produced document and order the return of the document to SBC. As SBC has failed to identify any case in which a court sitting in one circuit applied the law of another circuit to the issues of attorney-client privilege and waiver, this Court sees no reason to abandon the D.C. Circuit's binding precedent in favor of precedent from the Fifth Circuit.[3]

Based on the foregoing, the Court need not belabor the analysis of whether Defendant's Exhibit 1351 should be treated as a privileged document as the D.C. Circuit's precedent on the issue of inadvertent disclosure is unmistakably clear. Disclosure of otherwise-privileged materials, even where the disclosure was inadvertent, serves as a waiver of the privilege. *In re*

[3]The Court notes that any other conclusion has the potential to produce a bizarre and undesirable result. For example, if this Court were to apply Fifth Circuit law, and SBC or Microsoft then appealed the Court's decision arguing that this Court had improperly applied Fifth Circuit law, the D.C. Circuit would be in the unwelcome position of determining whether this Court had properly applied Fifth Circuit precedent. Most troubling in this hypothetical circumstance is that the D.C. Circuit would be, in effect, "bound" to apply existing Fifth Circuit law and would be unable to modify that law should it so desire. Such a result would severely distort the principles of "binding precedent" and "unitary federal law." *In re Korean Air Lines Disaster*, 829 F.2d at 1175-76.

Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989). "Short of court-compelled disclosure or other equally extraordinary circumstances, [the D.C. Circuit] will not distinguish between various degrees of 'voluntariness' in waivers of the attorney-client privilege." *Id.* (internal citations and footnote omitted). Though SBC recounts the expedited basis pursuant to which it produced the documents requested by Microsoft, SBC does not, and cannot, claim that it was somehow "compelled" by the Court to produce the documents before it had an opportunity to claim privilege. Similarly, the Court does not consider the circumstances of SBC's production of documents to suffice as "equally extraordinary circumstances," as discussed by the D.C. Circuit in *In re Sealed Case*, 877 F.2d at 980. *See e.g., Wichita Land & Cattle Co. v. American Federal Bank*, 148 F.R.D. 456 (D.D.C. 1992). Accordingly, the Court concludes that, even if Defendant's Exhibit 1351 would otherwise have been protected by the attorney-client privilege, SBC's disclosure of the document, however inadvertent, constitutes a waiver of any claim of attorney-client privilege.

Because any potential attorney-client privilege residing in the document has been waived, the Court need not reach the issue of whether, in the absence of such waiver, the document would be protected by attorney-client privilege. The Court notes, however, that contrary to SBC's assertion, the face of the document does not clearly support the proposition that the document reflects confidential client communications. Indeed, SBC offers no additional documentation to support its bald and conclusory recitation of the basis for the assertion of privilege. SBC Reply at 2. Regardless, the Court's conclusion that a potential claim of privilege has been waived necessarily requires the denial of SBC's motion. As SBC does not contend that the document constitutes a confidential business communication, disclosure of which would harm its business interests, and privilege has been waived, the Court sees no reason to curtail Microsoft's use of

the document in open court and on the public record.

Accordingly, it is this 8th day of April, 2002, hereby

ORDERED that SBC's motion to preclude Microsoft from introducing Defendant's Exhibit 1351 into evidence and for the immediate return of Defendant's Exhibit 1351 is DENIED; and it is further

ORDERED that SBC's motions with regard to Defendant's Exhibits 1352 and 1353 are DENIED AS MOOT.

SO ORDERED.

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COLLEEN KOLLAR-KOTELLY
United States District Judge